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FILED

SEP 18 1995

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No. 94-1387

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

REPRINTED COPY

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENTS

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BRIEF AMICUS CURIE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U.S. Supreme Court Rules, this Brief Amicus Curie is being filed with the written consent of all parties to the case, which will be separately filed with the court.

STATEMENT OF INTEREST

This Brief Amicus Curie is being submitted by the Association of Trial Lawyers of America, a National Bar Association consisting of more than 50,000 lawyers who primarily represent plaintiffs in personal injury and death litigation and worker's compensation claims. The Admiralty Law section of the Association includes most of the attorneys throughout the United States who specialize in maritime personal injury law.

The pending case is of great importance in that it will determine the extent to which state wrongful death statutes may be applied in cases involving fatalities occurring aboard pleasure vessels being operated in state waters. The decision will affect the outcome of many pleasure boat wrongful death cases now pending in the State and Federal Courts throughout the United States. We believe that, based on our research and analysis of the law and our experience in representing the victims of such accidents, our brief argument will be of assistance to the court.

Our brief will be limited to the following question presented, without any reference or review of the facts in this case.

QUESTION PRESENTED

Was the United States Court of Appeals for the Third Circuit correct in holding that the damages available to the family of the victim of a fatal recreational boating accident, occurring on navigable state territorial waters, are to be determined under applicable state statute?

SUMMARY OF ARGUMENT

I.

State states establishing the damages recoverable for wrongful death are not pre-empted by federal statutes, when considered in the context of a non-employment fatality occurring aboard a pleasure boat being operated in state waters. Congress has the power to pre-empt the entire field of maritime law, but has not done so. It is clear that admiralty courts sometimes to apply state law. *Jerome B. Grubart, Inc. v. Great Lakes, Dredge & Dock Co.*, _____*U.S.*____, *115 S. Ct. 1043, (1995)*. The Third Circuit was correct in finding that there is no federal statute pre-empting the application of damage remedies by state statute, since the Jones Act applies only to seamen and the Death on the High Seas Act excludes coverage of fatalities occurring within state waters. *Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).*

II.

Damage remedies available for pleasure boat fatalities under applicable state statutes are not displaced by the general maritime law cause of action for seamen and longshoremen, which was recognized by the court in *Moragne* and *Gaudet*. It is clear that the court in those cases was acting to fill a gap in

the wrongful death remedy available for seamen and longshoremen which had resulted from a series of its earlier decisions and the enactment of the Death on the High Seas Act and the Jones Act by congress. This court recognized a general maritime law cause of action for death resulting from unseaworthiness in *Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)*, and expanded upon it in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*, in order to provide seamen and longshoremen with a remedy for wrongful death resulting from unseaworthiness. In doing so, the court was acting to preserve uniformity in the duties and liabilities which govern the conduct of the parties, but did not seek any uniformity in the elements of damages recoverable in differing circumstances. *Miles v. Apex Marine Corp., 498 U.S. 19 (1990)*. In the decision below, the Third Circuit correctly concluded that the decisions of this court in *Moragne, Gaudet* and *Miles* did not establish an admiralty principle applying outside the claims of seamen and longshoremen. The decisions of this court and the exclusionary language of DOHSA leave state law damage remedies available for pleasure boat fatalities occurring in state waters. The decision of the court below is due to be affirmed.

III.

Policy considerations mandate that state wrongful death statutes be applied in state water fatalities occurring outside of federally regulated employment. Maritime law does seek uniformity, but the necessary uniformity is in the law determining the primary duties governing the conduct of the parties. The decision in *Moragne* was motivated by a desire to

preserve uniformity so that the rules governing conduct would not be disturbed by the denial of recovery. *Greene v. Vantage S.S. Corp., 466 F. 2d 1059 (4th Cir. 1972).* However, neither this court nor congress have required uniformity in the assessment of damages recoverable for wrongful death.

In the balancing of interests in the question at hand, the court should consider that a state should have the right to expect that its wrongful death statutes will provide uniform principles of damage recovery for deaths occurring within its territory. Certainly, manufacturers of products should also expect uniformity of death remedies within the boundaries of a given state, and do not mold their conduct around the possibility that they may escape the reach of state statutes in some instances.

It better becomes the humane character of the admiralty to give the remedy allowed under state law, rather than withhold it, when not required to withhold state law remedies by established and inflexible rules. *The Seagull, 21 F. Cas. 909 (4th Cir. 1865).* This is particularly true since the damage remedies enacted in DOHSA and the Jones Act do not fit well in pleasure boat fatalities, where the victim is more often a child, housewife, or retired person who has no dependents. The application of the Jones Act pecuniary damage limitation to the non-employment death of a child on a jet ski would leave only a nominal remedy for wrongful death. *Wahlstrom v. Kawasaki Heavy Industry, Ltd., 4 F. 3rd 1084 (2nd Cir. 1993); Choat v. Kawasaki Motors Corp., 1994 Amc. 2626 (Ala. 1994, application for rehearing pending).* Pleasure boat fatalities would

become damnum absque injuria, a harsh result which could not have been intended by this court.

ARGUMENT

I.

STATE STATUTES ESTABLISHING THE DAMAGES RECOVERABLE FOR WRONGFUL DEATH ARE NOT PRE-EMPTED BY ANY FEDERAL STATUTE, WHEN CONSIDERED IN THE CONTEXT OF A NON-EMPLOYMENT FATALITY OCCURRING ABOARD A PLEASURE BOAT BEING OPERATED IN STATE TERRITORIAL WATERS.

Article III, §2 of the United States Constitution defines the judicial power of the United States as including "all cases of admiralty and maritime jurisdiction". Article I, §8, Clause 18, gives congress the power to "make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this constitution and the government of the Untied States, or in any department or officer thereof." This court has held that these two constitutional provisions empower the congress to create a body of National Maritime Law. *Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).*

"Congress undoubtedly has power . . . to pre-empt the entire field of maritime law." *Oil, Chemical and Atomic Workers v. Mobil Oil Corp. 426 U.S. 407, 434-435 1976) (Stewart and Rehnquist, JJ. dissenting).* However, congress has not done so. "There is nothing remotely comparable [to field pre-emption] in the admiralty." *Ceres Terminals, Inc. v. Industrial Commission*

of Ill., 53 F. 3rd 183, 185 (7th Cir. 1995). Instead, the states have been left with a considerable legislative competence in the maritime field. Most recently, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* ____*U.S.*____, *115 S. Ct. 1043, (1995),* this court has made it clear that:

> ". . . exercise of Federal Admiralty Jurisdiction does not result in automatic displacement of state law. It is true that with Admiralty Jurisdiction comes the application of substantive Admiralty Law. But to characterize that law . . . as Federal Rules of Decision is destructive over-simplification of the highly intricate interplay of the States and the National government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope . . . Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules. . . . [It is] a fundamental feature of admiralty law that federal admiralty courts sometimes do apply state law. [115 S. Ct. at 1054]

Obviously, the Third Circuit was correct in its finding that there is no Federal Statute pre-empting application of the damage remedies provided by state statute. In this pleasure boat fatality, to paraphrase Justice O'Conner in *Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990),* the court sails in unoccupied waters. Although maritime tort law for seamen and

longshoremen is now dominated by federal statute, there are no federal statutes applying to pleasure boat fatalities in state waters, other than the three year statute of limitations now contained in 46 U.S.C. §763a.

The Jones Act, 46 U.S.C. App. §688, is limited by its terms only to the claims of seamen against their employers, for injuries and deaths occurring during the course of employment. The statute has no application or influence in a pleasure boat accident not involving employment. Therefore, the concerns as to the statutory constraints upon damages recoverable for the death of a seaman, expressed by the court in *Miles v. Apex Marine Corp., supra,* have no meaning in this pleasure boat fatality.

The only other federal statute applying to maritime accidental deaths is the Death on the High Seas Act, 46 U.S.C. §761, et seq. This statute, by its own terms, excludes coverage of fatalities occurring within state territorial waters. The statute also contains a clear expression of congressional intent that state statutes providing remedies for death shall not be pre-empted in actions arising in the State territorial waters:

> "§767 Exceptions from Operation of Chapter
>
> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be effected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

This court had occasion to discuss the effect of §7 of

DOHSA at length in *Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).* Section 2 of DOHSA provides that the damages recoverable in an action covered by the statute "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." The question before the court was whether the pecuniary damages allowed by DOHSA could be supplemented, in a case to which the statute applied, by damages recoverable under a state wrongful death statute. The Fifth Circuit, in *Tallentire v. Offshore Logistics, Inc., 754 F. 2d 1274 (1985)*, held that under the terms of §7 of DOHSA the plaintiffs were also entitled to recover damages allowed by the Louisiana Wrongful Death Statute, specifically non-pecuniary damages including loss of consortium, service and society. In so holding, the Court of Appeals concluded that §7 was intended to preserve the application of state wrongful death statutes on the high seas.

The Supreme Court reversed, holding that since §2 of DOHSA contained specific provisions as to damages recoverable and the beneficiaries of the cause of action, inconsistent state wrongful death statutes could not be applied in a case involving a death on the high seas within the scope of the Act. Based upon an extensive review of the legislative history behind DOHSA, this court concluded that the intent of the wording of §7, as adopted by congress, was to allow the state courts to retain concurrent jurisdiction along with the Federal Courts, to entertain causes of action arising under DOHSA. In so concluding, however, this court indicated that congress also intended that the states would continue to have

the right to enforce wrongful death remedies provided in state statutes in deaths occurring on territorial waters:

> We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." [477 U.S. at 227. emphasis added]

At several other points during the opinion, the court indicated an understanding that the intent of congress in the wording of §7 as adopted was not only to allow the states jurisdiction to adjudicate claims under DOHSA, but also to allow state wrongful death remedies to remain viable for accidents occurring on territorial waters:

> "These references persuade us that the first sentence of §7 was intended only to serve as a jurisdictional saving clause, insuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from the shore." [447 U.S. at 221. Emphasis added.]

Consistent with its earlier decision in *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)* the court held in *Tallentire* that since DOHSA specified the damages recoverable and the parties entitled to recovery, inconsistent remedies and state statutes are pre-empted by DOHSA where the statute applies, which is on the high seas. Neither *Tallentire* nor *Higginbotham*, however, would preclude other damages in the absence of this

statutory restraint.

II.

THE DAMAGE REMEDIES AVAILABLE FOR PLEASURE BOAT FATALITIES UNDER APPLICABLE STATE STATUTES ARE NOT DISPLACED BY THE GENERAL MARITIME LAW CAUSE OF ACTION, APPLYING TO THE DEATHS OF SEAMEN AND LONGSHOREMEN WHICH WAS RECOGNIZED BY THE COURT IN *MORAGNE* AND *GAUDET*.

The argument will no doubt be made in this case that state wrongful death statutes are pre-empted or displaced by the general maritime law cause of action recognized by this court in *Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)*; and expanded upon by the court in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*. Such an argument is enticing on its face, since ordinarily state law is applied in an admiralty case only in the absence of a controlling federal admiralty principle established by statute or decisional law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 337 (1955)*. However, the common law action, recognized in these cases in order to fill unfair gaps in the wrongful death remedies available for seamen and longshoremen, did not establish any controlling federal admiralty principle which specified the damages recoverable in the event of a non-employment death in state waters.

The anomalies in the law which leg to *Moragne* began with the decision in *The Harrisburg, 119 U.S. 199 (1886)*, where the court held that there was no common law cause of action

for wrongful death in admiralty. Therefore, in the absence of a wrongful death statute, the maritime law afforded no remedy. The courts thereafter uniformly applied state wrongful death acts to determine the remedies available for deaths occurring in state territorial waters. See, *e.g. The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893)*. The courts also recognize that, in limited circumstances, some state wrongful death statutes could be found to have extra territorial effect and be applicable to deaths occurring on the high seas. *The Hamilton, 207 U.S. 398 (1907)*. However, in most instances involving fatalities on the high seas, the extension of state wrongful death statutes was an arbitrary process and questionable at best. At times, all recovery for wrongful death on the high seas was denied. *The Middlesex, 253 F. 142 (Mass. 1916)*. In 1920 congress acted to remedy these deficiencies by adopting the Death on the High Seas Act, 46 U.S.C. §761, et seq. In the same year, congress also adopted the Jones Act, 46 U.S.C. App. §688, providing seamen with the same remedies for the injury and death occurring during their employment as where provided to railroad workers under the Federal Employer's Liability Act, 45 U.S.C. §51, et seq.

The unseaworthiness remedy, which had been little used before its application by this court in *Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)*, and its extension to longshoremen in *Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)*, began to create problems in the existing statutory scheme for wrongful death remedies. For longshoremen, who had a general maritime law remedy for injury caused by unseaworthiness of

the vessel under *Sieracki*, when the injury resulted in death the question of whether the family had a cause of action depended entirely on state law. The family of the deceased longshoremen had a cause of action only where the applicable state law permitted recovery of damages based upon a concept of liability without fault, such as unseaworthiness. *The Tungus v. Skovgaard, 358 U.S. 588 (1959).*

The other peculiarity which developed was the result of the holding in *Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964)*, that in adopting the Jones Act to provide a claim for wrongful death based on negligence, Congress pre-empted state wrongful death statutes which allowed a recovery for wrongful death based upon unseaworthiness. Ironically, the death on the high seas act obviously allowed such a cause of action.

These anomalies became intolerable to this court, as contrary to the notion that the court is charged with the duty of protecting those who were considered to be the wards of the admiralty. When confronted with the problem in *Moragne*, the court made it clear that it was acting out of a special solicitude for those who go down to the sea in ships, in recognizing a maritime common law cause of action for wrongful death. In crafting that wrongful death remedy, this court made it clear that its intent was to correct clear deficiencies in the maritime law as it applied to seamen and longshoremen:

> "[T]hese statutes, if construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, would perpetuate three anomalies of present law. The first of these is simply the discrepancy produced

whenever the rule of the Harrisburg holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produced liability outside the three-mile limit--since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see Kernan v. American Dredging Co., 355 U.S. 426, 430 n. 4, 2 L Ed 2d 382, 387, 78 S Ct 394 (1958)--but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. . . . [S]ince the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three mile limit, no rational policy supports this distinction in the availability of a remedy.

The third, and assertedly the 'strangest' anomaly is that a true seamen--that is, a member of a ship's company, covered by the Jones Act--is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute." [398 U.S. at 395-396, footnotes omitted.]

The court made it clear that it was overruling the *Harrisburg* for the purpose of recognizing a federal remedy for seamen which would not be considered as pre-empted by the Jones Act, while also allowing consistent remedies for injuries and deaths to longshoremen, who then had an unseaworthiness remedy.

Very obviously, the court did not express any intent by recognizing this general maritime law cause of action for seamen and longshoremen, to displace the application of state wrongful death statutes to other fatalities occurring in state waters. The court was obviously concerned with remedying the deficiency at hand, and did not evidence an intent to deprive the states of the power to specify damages in the event of state water fatalities occurring in activities other than federally regulated maritime employment:

> "The resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happened to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be damnum absque injuria unless the States expand their remedies to match the scope of the federal duty.

To put it another way, the message of the Act is

> that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any non-statuary federal remedies that might be found appropriate to effectuate the policies of general maritime law." [398 U.S. at 399, 400. Emphasis added; footnotes omitted.]

When this court next visited the issue of this wrongful death remedy under general maritime law, in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*, this court again made it clear that it was acting in the interest of the wards of the admiralty court:

> "In overruling the Harrisburg, Moragne ended these anomalies by the creation of a uniform federal cause of action for maritime death, designed to extend to the dependents of maritime wrongful-death victims admiralty's 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.' . . . Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this 'special solicitude' to the dependents of the seafaring decedent." [414 U.S. at 577.]

In *Gaudet*, a case involving a death of a longshoreman in state waters, the court outlined the damages recoverable in the common law death remedy recognized in *Moragne*, drawing heavily on the damages recoverable under the majority of state wrongful death statutes. Still, the court continued to express no intent to displace state wrongful death statutes in other fatalities occurring on state waters:

> "Nothing in the legislative history of the [Death on the High Seas] Act suggests that congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death remedy which this court might deem 'appropriate to effectuate the policies of general maritime law.' To the contrary, Congress' insistence that the Act not extend to territorial waters . . . indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See Greene v. Vantage S.S. Corp., 466 F. 2d 159 (CA 4 1972)." [414 U.S. at 588, n. 22; emphasis added.]

This court dealt with the maritime common law death remedy most recently in *Miles v. Apex Marine Corp., 498 U.S. 19 (1990)*. In that case the court was confronted with the question of whether damages for loss of society could be recovered in the case of a seaman killed in state waters by an unseaworthy condition, when such damages are not included within the pecuniary losses allowed by the Jones Act. Once again, the court acknowledged that the common law death action recognized in *Moragne* was crafted to allow a remedy for the deaths of seamen and longshoremen resulting from unseaworthiness. The common law death action allowed a uniformity of remedies, but did not mandate a uniformity of damages recoverable. Indeed, the court recognized the

continued viability of *Gaudet*, in that the families of longshoremen would be permitted to recover damages for loss of society in a state waters death action. However, the court held that such damages were not available to seamen because they are not within the pecuniary wrongful death damages allowed in the Jones Act:

> "The logic of *Higginbotham* controls our decision here. The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen. *Gaudet* did not consider the preclusive effect of the Jones Act for deaths of true seamen. We do so now. . . .
>
> Incorporated FELA unaltered into the Jones Act, congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. . . . There is no recovery for loss of society in a Jones Act wrongful death action.
>
> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that [the decedent] had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from

> negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. [498 U.S. at 32, 33.]

On the same basis, the court declined to allow the estate of the decedent to recover future loss of earnings, because the survival action incorporated in the Jones Act limits recovery to losses suffered during the decedents' lifetime:

> "We sail in occupied waters. Maritime tort law [for seamen] is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act." [498 U.S. at 36.]

In so holding, the court obviously did not speak to the remedies available to others, whose causes of action are not dominated by federal statute.

Against this backdrop, the Third Circuit was called upon to determine what body of law supplied the principles for the damages recoverable in the death of a twelve year old girl, occurring in a "jet ski" accident in territorial waters. In the decision below, *Calhoun v. Yamaha Motor Corp. 40 F. 3rd 622 (3rd Cir. 1994)*, the court first noted that in admiralty cases, determining when federal maritime law displaces state laws as proven to be a tricky process. In *American Dredging Co. v. Miller, 510 U.S.____, 114 S. Ct. 981 (1994)*, this court indicated that the "unhelpful abstractness" of the language employed in

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), left litigants "without a reliable compass for navigating maritime pre-emption problems." [Id. 114 S. Ct. at 991] There this court admitted that it has struggled in setting the boundary between conflicting and non-conflicting state regulations in the area of maritime affairs:

> "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." [510 U.S. at _____, 114 S. Ct. at 987]

We believe that the Third Circuit correctly navigated and succinctly summarized the decisions of this court from *Moragne* through *Miles*. It recognized that the common law death remedy crafted in *Moragne* and *Gaudet* was intended to fill gaps between state and federal legislation and eliminate the three "anomalies" existing in the death remedies for seamen and longshoremen after the advent of the unseaworthiness liability remedy. It recognized that the decision of this court in *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)* was mandated by the fact that congress had specified the damages recoverable under DOHSA and therefore the court was not at liberty to authorize supplementary relief. Similarly, in *Tallentire* the congress had spoken to the question of damages for deaths on the high seas, and thus the court was not free to supplement the statutory scheme with a state law remedy where DOHSA applied. Finally, in *Miles* the Third Circuit recognized that the Supreme Court was likewise restricted by the damages allowed

under the Jones Act.

More importantly, the Third Circuit correctly concluded from these opinions that, in areas where federal statutes have no application, and an established admiralty principle does not govern, the grafting of remedies from state statutes is appropriate:

> "But importantly for this appeal, *Miles* showed no great hostility to the operation of state statutes in providing rules of decision in admiralty cases.
>
> The passage above quoted ['Congress and the states have legislated extensive in these areas'] hints that state statutory schemes have a role to play in admiralty cases. Such a role received fuller articulation later in the *Miles* opinion, where the court discussed the question whether a general maritime survival action existed. Although it ultimately declined to address the issue, the Court's discussion seemed to sanction some lower courts' practice of applying state survival statutes to deaths at sea . . . ('Most States have survival statutes applicable to tort actions generally, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. . . . .' [40 F. 3rd at 636]"

With the holding of *Gaudet* applying only to longshoremen [*Miles, 498 U.S. at 31*], Yamaha argued below that state law was precluded by the general maritime law remedy, with only the damages provided in DOHSA allowable. The Third Circuit correctly rejected the false logic of this argument:

> "*Tallentire's* interpretation of DOHSA is also important for another reason. It suggests that there is a more fundamental flaw in *Yamaha's* argument that the incorporation of DOHSA's provisions into a *Moragne* cause of action should be treated as displacing all state wrongful death remedies. If *Yamaha* is right, it means that *Moragne* gives DOHSA preclusive effect in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect. . . . So interpreted, *Moragne* would thus transform a statute explicitly designed to preserve state remedies into one that would displace them. In our view, such a result would cut *Moragne* loose from its conceptual moorings and disregard Supreme Court teachings since *Moragne* that we must look to congressional statutory commands to determine what remedies are available for maritime deaths.
>
> But even if DOHSA is not treated as *explicitly* allowing state law to operate in this area, at the very least the legislative history of DOHSA shows no hostility toward the application of state wrongful death statutes in territorial waters. . . . And since a 'clear conflict' must exist before state law is displaced by federal admiralty law, . . . we cannot find that *Moragne* displaces state wrongful death remedies for deaths of non-seamen in territorial waters. [40 F. 3rd at 642, 643]

We believe that this reasoning is correct and that the decision of the court below is due to be affirmed.

III

POLICY CONSIDERATIONS MANDATE THAT STATE WRONGFUL DEATH STATUTES BE APPLIED IN STATE WATER FATALITIES OCCURRING OUTSIDE OF FEDERALLY REGULATED EMPLOYMENT.

The first policy consideration normally expressed by the courts in determining the breadth of maritime law is the desire to maintain uniformity. However, as the decisions of this court in *Moragne, Gaudet* and other cases illustrate, the needed uniformity is in the primary duties governing the conduct of the parties. This was the obvious motivating factor in the recognition of the common law death remedy in *Moragne*:

> "There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most states. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will general provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations. 'If the new remedial doctrine serves simply to reinforce and make more effectual well-understood primary obligations, the

net result of innovation may be to strengthen rather than to disturb the general sense of security.'" [398 U.S. at 403, 404]

The lower courts have consistently recognized that the uniformity that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries. *Dennis v. Central Gulf S.S. Lines, 453 F. 2d 137 (5th Cir. 1972); Greene v. Vantage S.S. Corp., 466 F. 2d 1059 (4th Cir. 1972).*

In the field of pleasure boat accidents, this court has recognized the need for uniform application of the maritime rules which govern the conduct of the parties, as well as uniform principles governing liability and defenses applied in post accident litigation. *Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982); Sisson v. Ruby, 497 U.S. 358 (1990).* In cases of alleged defective products, such as this one, this court has also recognized established principles for product liability. *East River S.S. Corp. v. TransAmerican Delavell, 476 U.S. 858 (1986).* However, neither this court nor the congress has ever required uniformity in the assessment of damages recoverable for wrongful death. Indeed, this court required non-informity of damages when it found that the *Moragne* remedy was available to seamen, but without the *Gaudet* damages allowed to Longshoremen. *Miles, 498 U.S. at 27-31.*

Since the decisions in *American Dredging Co. v. Miller, 510 U.S.___, 114 S. Ct. 981 (1994),* and *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co., ___U.S.___, 115 S. Ct.*

1043 (1995), this court has employed a balancing of interests test in resolving apparent conflicts between state and federal law in admiralty cases. In the absence of an applicable federal statute, or an established maritime law principle governing the question, there is no reason why state law should not apply, provided it does not unreasonably impact maritime commerce. In the balancing of interests on the question at hand, this court should consider that a state should have the right to expect that its wrongful death statutes will provide uniform principles of damage recovery for deaths occurring within its territory. If state death statutes happen to provide greater damages than DOHSA, the only effect would be to encourage more uniform compliance with the duties which govern the conduct of the parties in the first instance, by perhaps making it more expensive for a wrongdoer to kill his victim, rather than merely injure him. It is also reasonable for Yamaha to expect uniform death remedies within the boundaries of a given state. Yamaha has no reason to expect that its liability and damages will be less when its product is a jet ski on the water, than when is product is a motorcycle on the land a short distance away. Certainly manufacturers do not mold their conduct around the possibility that in some instances they may escape the reach of state statutes.

The denial of state law remedies in a pleasure boat fatality occurring in state waters, where no federal statute is controlling, would violate the wisdom expressed by Chief Justice Chase in *The Seagull*, 21 F. Cas. 909 (4th Cir. 1865), which has frequently been quoted with approval by this court:

> "There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but . . . certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." [Id at 910]

An attempt to transfer the damage remedies afforded by DOHSA and the Jones Act to state water pleasure boat accidents will too often result in the denial of a remedy. When congress enacted DOHSA and the Jones Act, it obviously was acting with the seafarer in mind. Most often applicable in an employment situation, the damages allowed for accidental death by these statutes deal mainly with the replacement of financial losses suffered by widows and children. Since the Jones Act provides a seaman with the remedy for job injury, and also considering the fact that liability principles based upon slight negligence and strict liability in unseaworthiness weigh heavily in the seaman's favor, some statutory restriction on damages is understandable.

However, the pecuniary damage principles selected by congress for application to the death of a breadwinner at sea do not work well in pleasure boat and jet ski fatalities, where the victim is more often a child such as Natalie Calhoun, a housewife, or a retired person who has no dependents. It certainly becomes the humane character of the admiralty to allow the remedy afforded by state wrongful death statutes in these cases, since the admiralty is not constrained by federal

statute to withhold the remedy.

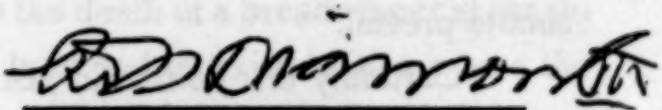
The application of state statutes to such cases is particularly appropriate in view of the fact that many of the lower courts have read far more into the meaning of the *Miles* decision than this court could ever have intended. For instance, many courts have concluded that *Miles* precludes the recovery of punitive damages in admiralty, a subject not even discussed by the Supreme Court in that case. See, for example, *Guevara v. Maritime Overseas Corp, 59 F. 3rd 1496 (5th Cir. 1995)*. In other jet ski cases, other courts have carried the Jones Act pecuniary damage limitation from *Miles* over into the non-employment death of a child, leaving the parents with a nominal remedy for wrongful death. *Wahlstrom v. Kawasaki Heavy Industry, Ltd., 4 F. 3rd 1084 (2nd Cir. 1993)*. Indeed, in an opinion not yet released for publication, the Alabama Supreme Court has read so much into the *Miles* opinion that the parents of a child killed in a jet ski accident may have no more remedy than the recovery of funeral expenses. *Choat v. Kawasaki Motors Corp., 1994 Amc. 2626 (Ala. 1994, application for rehearing pending)*. In effect, pleasure boat fatalities could become "damnum absque injuria" if this interpretation of *Miles* should prevail.

Certainly this court did not intend such harsh results should flow from its decision in *Miles*. It is very unlikely that congress intended or anticipated such results in its 1920 legislation aimed at providing remedies to seamen for job injuries and remedies for deaths on the high seas.

CONCLUSION

For these reasons, we believe that this court should affirm the Third Circuit, and hold that state wrongful death statutes are applicable to pleasure boat fatalities occurring in state waters. This result is consistent with the intent of congress in its maritime legislation to date, and certainly consistent with the prior opinions of this court. Such a result would produce uniform damage remedies for wrongful deaths occurring within a given state, while preserving the uniformity of the maritime duties which govern the conduct of the parties in the first instance. If for any reason this court should feel constrained to conclude that state statutes cannot apply in these circumstances, then we would urge the court to re-open the writ in this case to also resolve the second question presented in the petition for certiorari, so as to resolve the growing uncertainty as to the damages recoverable in a state water pleasure boat fatality.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon all parties, by depositing a copy of the same in the United States Mail, properly addressed and first class postage prepaid this 15 day of September 1995.

ROSS DIAMOND III

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